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In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITIONERS' REPLY BRIEF

JOHN J. GRAVES, JR.
601 South Sixth Street
Las Vegas, Nevada 89101
(702) 385-7277
Attorney for Blanton

JOHN G. WATKINS
333 North Rancho Rd., #633
Las Vegas, Nevada 89106
(702) 646-3155
Attorney for Fraley

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving a vehicle while intoxicated under Nevada state law is a "serious" crime to which the right to jury trial applies.

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ARGUMENT

I.

Post-Baldwin Tests Used to Determine and Analyze the Right to Trial by Jury

In *Muniz v. Hoffman*, 422 U.S. 454 (1975), this Court, in determining whether a right to trial by jury existed for criminal contempt pursuant to §10(1) of the Labor Management Relations Act, as amended, "capsulated" constitutional doctrine at 422 U.S. 475-76:

> (1) Like other minor crimes, "petty" contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial;
>
> (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary;
>
> (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial;
>
> (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Paragraph 2 is a restatement of the "nature of the offense" test, while paragraph 3 leaves the door open to consider punishment or penalties *other than* potential incarceration and fine. *Muniz* was decided the year after *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) which stated at 418 U.S. 512:

> Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes.

This author concludes that this Court utilized the *Baldwin, infra,* test in the *Codispoti* case because only a fine and incarceration were at issue. Further, *Baldwin v. New York,* 399 U.S. 66 (1970) was relied upon as authority, which case preserved the "nature of the offense" test. *Baldwin,* 399 U.S. at 69, n.6. The "nature of the offense" test, therefore, remains viable, and the consideration of penalties other than incarceration and fine has been legitimated.

In *Welsh v. Wisconsin,* 466 U.S. 740 (1984), a warrantless home DWI arrest case, Justice White joined by Justice Rehnquist, in dissent, set out certain factors which indicated the "seriousness" of the DWI offense under consideration there. 466 U.S. at 763. Going beyond mere incarceration and fine, one factor was found to be the right to trial by jury set by the legislature, and another factor was the consequence of mandatory driver's license revocation upon conviction of DWI. Cases relied upon as authority were *United States v. Craner,* 652 F.2d 23, 24-27 (CA9 1981); *United States v. Woods,* 450 F.Supp. 1335, 1340 (Md. 1978); *Brady v. Blair,* 427 F.Supp. 5, 9 (SD Ohio 1976), all DWI jury trial cases. The "nature of the offense" case of *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) was also cited.

These lower federal court decisions, *supra,* as well as analysis set out in *United States v. Jenkins,* 780 F.2d 472 (CA4 1986) and *Landry v. Hoepfner,* 840 F.2d 1201 (CA5 1988), never rely solely on a six-month incarceration "bright-line" standard. Invariably, the "nature of the offense" test, penalties beyond incarceration and fine, and the right to trial by jury in other State jurisdictions are placed into the mix, and balanced against the six-

month standard. The lower federal courts seem reticent to adopt a rigid, fixed test, as Respondent and its *amici* would have this Court do. Even *Landry v. Hoepfner, supra,* a decision which denied the right to trial by jury in a Louisiana state case, parsed each and every non-"bright-line" test, and argued it away.

Amicus State of Nevada complains that Petitioners' authority, *United States v. Craner, supra,* did not legitimate a "collateral consequences" test because the DWI offense there at issue arises from a federal regulation, not Congress as the Nation's surrogate. Petitioners urge this case to the Court's attention because it weighs maximum penalty and other factors about equally in determining the seriousness of the offense.

This Court is urged by Petitioners to retain the reliable, clear-cut *Baldwin* test, but to allow the lower State and Federal courts, at need, as in the case at bar, to evaluate the right to trial by jury by other criteria, *supra.* There are certain offenses, like the Nevada DWI law, which cannot be properly catalogued under the "bright-line" umbrella solely; such offenses cannot be isolated from other real, societal factors and forces that unquestionably gauge them "serious." These hybrid crimes seeking "serious" status, sharing elements of the petty and the serious, should be far and few between. To even imagine a petty crime that would burst onto the American landscape as this DWI offense has done, is difficult, and even that offense has taken 10 years to ripen.

II.

This Court Has Determined That DWI is a Serious Offense

In cases decided by this Court after *Baldwin v. New York,* 399 U.S. 66 (1970), the offense of DWI and its

societal consequences has been painted in somber tones. In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), a DWI case allowing the use of a Defendant's refusal to submit to a blood-alcohol test before the trier of fact as evidence of guilt, the majority prefaced its decision with these words:

> The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715, 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

These vivid passages illuminate " . . . an offense of a grave nature, affecting the public at large; . . . ". *Callan v. Wilson*, 127 U.S. 540, 556 (1888). This section of the *Neville* case, itself amply answers *amicus* State of Nevada's assertion (Br. 21) that " . . . Driving under the influence of liquor is not an inherently evil and injurious act as the act itself does not necessarily injure another person and is not universally considered as immoral . . . "

This Court has also expressed the belief that the prevention of drunken driving was properly a *major* concern to the States. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984); *Welsh, supra*, 466 U.S. at 755 (Blackmun, J., concurring), " . . . the child (drunk driver) is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's (drunk driver's) act." (Parentheses and content added); see also, *Welsh, supra*, 466 U.S. at 762-63 (White, J., dissenting).

Amicus State of New Jersey (Br. 21-22) concludes, without authority, that the alternate method of prosecuting drunk driving cases which focuses on 0.10% or more by weight of alcohol in the driver's blood, and de-emphasizes evidence of driving difficulty, field sobriety tests, and physical signs of intoxication, indicates that drunk driving is not a *malum in se* offense. On the contrary, this alternate, easily provable method of conviction attests the firm intent of every State to convict drunk drivers and deter others. See *Welsh, supra*, 466 U.S. at 763 (White, J., dissenting). It does not follow that an offense ceases to be "serious" or one *malum in se* just because a State makes the imminently logical choice to crack down on offenders by a surer, more efficient method of proof.

The cases of this Court, as few as they are, on DWI-related issues, clearly reflect the Nation's perception that the nature of the offense of DWI is "serious", a *malum in se* crime that is "immoral in its nature and injurious in its consequences." Compare, *Morrisette v. United States*, 342 U.S. 246 (1952). Indeed, Respondent and its *amici* cite no case from this Court which states that DWI, as presently constructed in most State jurisdictions and by the federal government, is not a crime *malum in se*; Petitioners have,

however, cited several cases where DWI has been held to be an offense *malum in se* (Br. 22), as well as indicative comments set out in the *Neville* and *Welsh* cases, above.

III.

The Impact of Nationwide DWI Jury Trials

First, only a handful of States do not allow the right to trial by jury in DWI prosecutions. See Appendices of Petitioners, *amici* United States and State of New Jersey. Any decision made by this Court in favor of DWI jury trials will have little national impact. The only State directly affected will be Nevada, although five or six States will have to re-evaluate their existing DWI laws.

Second, neither Respondent nor its *amici* have responded to statistics provided by Petitioners which indicate a waiver rate of upwards of 90% in misdemeanor trials. See Appendices "C" and "D", Opening Brief. In fact, in the State of Nevada itself, Washoe County (Reno Justice Court), as pointed out by *amici* A.C.L.U. (Br. 59-60), jury trials in DWI offenses were set in motion in 1986. In that year 707 individuals were charged but only one jury trial was held at an expense of $284.70. In 1987, 897 individuals were charged, and only 12 jury trials conducted at a total cost of $4,961.36. The waiver rate in 1987 was, therefore, over 98%. Similar high waiver rates were recorded in *Baldwin v. New York*, 399 U.S. 66, 74 n.22 (1970).

Third, *amicus* State of New Jersey paints a gloomy picture of "massive delays" in its judicial system if jury trials were required, thereby impinging on the right to speedy trial. (Br. 26) Amendment VI, United States Constitution. Not only is this supposition unsupported in fact

in New Jersey's brief, but it fails to account for uninterrupted functioning of larger, more complex judicial systems found in the States of New York, California, Illinois, and elsewhere, where DWI jury trials have been allowed for decades.

Further, fiscal impact, also a complaint of Respondent and its *amici*, is a factor that must be weighed along with other factors, it is not of controlling weight. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

In the area of trial by jury, a more pervasive dedication is found in the cases of this Court. As stated in *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968):

> Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

It may further be noted that fiscal considerations have never been injected into the calculus of the right to trial by jury in the previous cases of this Court.

Amicus State of New Jersey (Br. 18), citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), argues that a court's consideration of mandatory sentencing minima as found

in Nevada's DWI statute " . . . would illogically compel a jury trial with respect to the offense solely because, in a given case, the prosecutor alleges the existence of . . . aggravating factors and thus seeks the minimum statutory penalty . . . " *McMillan* is mischaracterized in this context. That case forbade a jury trial at a sentencing hearing where the State proved a fact, to wit, that the defendant "visibly possessed a firearm." Upon that finding, by a preponderance of the evidence, a mandatory term was imposed. Here, no fact is proved at sentencing, the mandatory minimum sentence is automatic. Further, Nevada DWI law does not require any aggravating circumstances to be pled, except for subsequent offenses after first conviction. More importantly, mandatory punishments are simply a factor for this Court to consider in determining whether the offense of DWI is serious.

The dire consequences prophesied by the States of Nevada, New Jersey, and Louisiana are, in a constitutional sense, a tempest in a teapot, and unsupported by hard data. Petitioners, on the other hand, as the petitioner in *Baldwin, supra*, have set out the expected high waiver rate of DWI jury trials, minimal costs in Nevada, and a constitutional imperative and commitment to trial by jury where fiscal impact, although a factor, does not carry controlling weight. The verbal hand-wringing of the States in their *amici* briefs brought on by fears of costs and court congestion are more imagined than real. The plain truth is that in Nevada presently, DWI trials are assembly line swift, cheap, and conviction rates are high (82%). It is not hard to imagine why Nevada would hate to give this up.

IV.

The "Bright-Line" Test

Amici for Respondent and the Respondent itself urge this Court in the strongest terms to stubbornly follow a "bright-line" test enunciated in *Baldwin, supra*, and to abandon other tests used to determine the right to trial by jury. This reasoning fails to take into account that " . . . the boundaries of the petty offense category have always been ill-defined, if not ambulatory." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). Basically this Court is being urged to paint itself into a corner by using one test to evaluate every offense.

The *Baldwin* "bright-line" test works fine when incarceration and fine are the only penalties, and the nature of the offense does not indicate a serious offense. But when other significant penalties appear, and the nature of the offense indicates seriousness, a meaningful argument can be made for the right to trial by jury. A review of States' practices in regard to the grant of jury trial should also be made as the third part of the litmus test.

For the Court to rule otherwise, and rest upon the "bright-line" standard of *Baldwin*, will send a message to the States that the "packing" of punishment "under the line" is condoned as long as the six-month barrier is not punctured. The "bright-line" standard is convenient and sure, but in certain offenses, as in the DWI case at bar, the "deep commitment" of this Nation to the right of trial by jury cannot be sacrificed to a sterile "bright-line" requirement. It must be remembered that the "bright-line" standard is just one of this Court's standards, not *the* standard. To adopt one test to the exclusion of the others would be myopic.

Amicus State of New Jersey contends that federal-state disputes will arise if this Court adopts a test or tests other that a "bright-line" standard. Again, this "flood-gate" argument does not withstand analysis. Other than DWI, counsel for Petitioners know of no State petty offense which presses for "serious" status. Even this DWI offense has taken almost a decade to mature to its present posture as a serious crime. But the last answer is that the lower courts can respond to requests for jury trial made in criminal offenses which develop into serious offenses over the course of years.

Amicus State of New Jersey, indeed, concedes that "(o)ther tests and factors proposed by petitioners and *amici curiae* national and Nevada chapters of the American Civil Liberties Union . . . for distinguishing 'petty' from 'serious' offenses are presumably capable of "bright-line" formulation, but are laden with negative consequences . . . " *Amicus* then argues that the decision to allow trial by jury should be left to the legislatures.

V.

Classification of the Offense by the States and Federal Government

Amicus State of New Jersey (Br. 24-25) argues that 22 States punish DWI with potential incarceration beyond the six-month *Baldwin* standard, 4 States have determined that DWI is a "serious" offense independent of relevant penalties, 6 States do not allow DWI jury trials, and 19 States do not recognize *Baldwin's* petty/serious dichotomy for any offense. The point is asserted that these latter 19 jurisdictions are, as support for a national consensus, useless as to those jurisdictions' views as to the

seriousness of drunk driving. This argument, at first blush, possesses appeal, but upon closer analysis the argument fails. Because a State chooses to allow a defendant the right to trial by jury in DWI *and* other non-serious offenses, means no more than that State has determined that *all* criminal offenses are serious, and worthy of the right to trial by jury. The reasoned voices of 19 States cannot be just dismissed. It is less a question of whether these 19 States consider DWI to be a serious offense, and more a question of 45 States absolutely allowing jury trials for DWI defendants. In the vast majority of States, a defendant has a jury trial option (even in Reno, Nevada), but in 6 States the unlucky defendant has no option.

The federal government in 18 U.S.C. §1 punishes petty offenses with as much as 6 months imprisonment and a $5,000 fine. This Court, however, has specifically determined that that definition cannot be accorded talismanic significance. *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975).

Respondent and its *amici* argue that this Court in *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098 (1987), *reh'g denied* 107 S.Ct. 1913 (1987), in not ruling on the basis of sheer numbers of States which have adopted a rule, should thereby adopt a similar posture in this case. First, Petitioners do not urge the numbers of States which allow the right to jury trial as a sole determining test, but as one test in the ultimate determination that DWI is a serious offense. Second, the sense of this Court's cases indicates national uniformity as a defined goal. *Baldwin v. New York*, 399 U.S. 66, 70-71 (1970). National uniformity is

turned upside-down if 6 States can mandate the federal constitutional rule for the 45.

This Court has further found that although classification is a matter for the States, that

> In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance.

The State of Nevada, by way of the penalties available for DWI, has implicitly assigned that offense to the serious category. Respondent and its *amici* in their briefs, have been strangely silent about whether those punishments call for a right to trial by jury. This Court can review Appendix "B" of Petitioners' Opening Brief for criminal sanctions and civil (administrative) actions associated with a DWI conviction for the States as a whole. Nevada's DWI law, of course, contains added punishments not listed in this table.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that the judgment below be reversed.

Respectfully submitted:

GRAVES, LEAVITT & KOCH

JOHN G. WATKINS, ESQ.
333 North Rancho Road, #633
Las Vegas, Nevada 89106

(702) 646-3155

Attorney for Petitioner
Mark D. Fraley

JOHN J. GRAVES, JR., ESQ.
601 South Sixth Street
Las Vegas, Nevada 89101

(702) 385-7277

Attorney for Petitioner
Melvin Ray Blanton